

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

West Bend Mutual Insurance Company,

Plaintiff,

vs.

ANSWER AND COUNTERCLAIM
Case No. 0:19-cv-02346-PJS-ECW

Laurie Gregor, N.M. by Crystal and
Brendan McNally, Crystal McNally, in her
individual capacity, and Brendan McNally,
in his individual capacity,

Defendants,

And

Crystal McNally and Brendan McNally,
individually and on behalf of their minor
child, NM,

Third Party Plaintiffs,

vs.

West Bend Mutual Insurance Company,

Third Party Defendant.

Defendants Crystal McNally and Brendan McNally (hereinafter "the
McNally Defendants), for themselves individually and on behalf of N.M, for their
Answer state as follows:

ANSWER

1. The allegations of the Complaint for Declaratory Relief are denied
except as to those allegations specifically admitted below.

2. The allegations in paragraphs 1 through 6 are admitted.

3. The allegation in paragraph 7 that the McNally Defendants are residents of Shakopee, Minnesota is denied. The McNally Defendants currently reside in Jordan, Minnesota.

4. The allegations in paragraphs 8 and 9 are admitted.

5. The allegations in paragraphs 10 through 14 are admitted.

6. With respect to the allegations in paragraphs 15 through 18, it is admitted that Laurie Gregor was charged in a criminal complaint with (1) Assault - 1st Degree – Great Bodily Harm, (2) Malicious Punishment of a Child, and (3) Malicious Punishment of a Child - Child under 4 years.

7. Paragraph 19 is admitted.

8. The McNally Defendants are without information sufficient to form a belief as to the allegations in paragraphs 20, 21, and 22. The McNally Defendants do admit that they intend to pursue the claim in the underlying Complaint (Plaintiff's Exhibit A), which civil action has been stayed by an Order of the Minnesota State District Court.

9. The McNally Defendants are without information sufficient to form a belief as to the allegations in paragraphs 23 through 26.

10. The McNally Defendants are without information sufficient to form a belief as to the allegations in paragraphs 27 through 31.

11. Paragraph 32 is admitted.

12. The McNally Defendants affirmatively state that Laurie Gregor negligently fractured the skull of and caused a traumatic brain injury to N.M., as set forth in the Underlying Complaint (Plaintiff's Exhibit A).

13. The McNally Defendants affirmatively state that Laurie Gregor's criminal act of shaking NM occurred after the skull fracture and traumatic brain injury that had already been negligently caused by Laurie Gregor.

14. The McNally Defendants affirmatively state that Laurie Gregor's criminal act of shaking did not cause NM's skull fracture and the related traumatic brain injury, which injuries occurred prior to the criminal act of shaking.

15. The McNally Defendants affirmatively state that nothing in the language of the Plaintiff's insurance agreement with Laurie Gregor absolves Plaintiff West Bend Mutual Insurance Company from its obligation to indemnify Laurie Gregor for those damages that she negligently inflicted on N.M., prior to any criminal act.

16. West Bend Mutual Insurance Company provided liability insurance to Laurie Gregor in the amount of one million dollars (\$1,000,000) for the occurrence on September 14, 2017, in which she negligently injured N.M.

17. The damages negligently inflicted on N.M. by Laurie Gregor, prior to the commission of any criminal act, are reasonably valued at an amount in excess of \$1,000,000.

18. The McNally Defendants ask the Court to declare that West Bend Mutual Insurance Company remains liable to indemnify Laurie Gregor in the

amount of \$1,000,000 for the damages that she negligently inflicted on N.M. on September 14, 2017.

19. To the extent that factual issues must be resolved in order to determine the value of damages caused by the negligence of Laurie Gregor prior to her criminal acts, the McNally Defendants request a jury trial.

COUNTERCLAIM

Third Party Plaintiffs Crystal McNally and Brendan McNally, for themselves individually and on behalf of their minor child N.M., for their Counterclaim against West Bend Mutual Insurance Company, state as follows:

PARTIES

20. Crystal McNally and Brendan McNally are the parents of N.M. The family resides in Jordan, Minnesota.

21. West Bend Mutual Insurance Company is a corporation organized under the laws of Wisconsin, with its principal place of business in West Bend, Wisconsin.

JURISDICTION AND VENUE

22. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§1332(a) and 1332(c)(1) because there exists complete diversity of citizenship between Third Party Plaintiffs and the Third Party Defendant and the amount in controversy exceeds \$75,000.

23. This action is properly venued pursuant to 28 U.S.C. §1391(b)(2) because the negligent act at issue occurred in the District of Minnesota.

FACTS

24. In September, 2017, Laurie Gregor operated a licensed day care service in her home in Shakopee, Minnesota.

25. On Thursday, September 14, 2017, a six month old infant, N.M., was in Laurie Gregor's care in her capacity as a licensed day care provider.

26. At approximately 11:00 a.m., Laurie Gregor negligently dropped N.M.

27. As a result of Laurie Gregor's negligence, N.M. fell and struck his head on a hard ceramic tile floor.

28. As a result of Laurie Gregor's negligence, N.M. sustained injuries including but not limited to a skull fracture and a traumatic brain injury.

29. As a direct result of Laurie Gregor's negligence, Crystal McNally and Brendan McNally incurred medical expenses for the treatment of N.M. related to the injuries negligently caused by Laurie Gregor.

30. The medical expenses incurred by Crystal and Brendan McNally for the treatment of N.M. currently exceed \$163,000.

31. N.M. has sustained permanent damage from the skull fracture and traumatic brain injury negligently caused by Laurie Gregor and the damages caused by Laurie Gregor's negligence are reasonably valued at an amount in excess of one million dollars (\$1,000,000).

32. West Bend Mutual Insurance Company, at all times relevant to these proceedings, was obligated to indemnify Laurie McGregor for damages that she negligently inflicted upon N.M.

33. West Bend Mutual Insurance Company provided Laurie Gregor with one million dollars (\$1,000,000) in liability insurance coverage for the occurrence in which she negligently injured N.M. on September 14, 2017.

34. West Bend Mutual Insurance Company is liable to the Third Party Plaintiffs for one million dollars (\$1,000,000).

35. A jury trial is requested pursuant to Rule 38 of the Federal Rules of Civil Procedure.

WHEREFORE, Crystal and Brendan McNally, individually and on behalf of their minor child N.M., ask for relief as follows:

1. With respect to the Declaratory Judgment action initiated by West Bend Mutual Insurance Company, a judgment declaring that no provision of the West Bend Mutual Insurance Company policy absolves the insurance company of its obligation to indemnify Laurie Gregor for damages negligently inflicted on N.M. prior to her criminal act.

2. With respect to the Declaratory Judgment action initiated by West Bend Mutual Insurance Company, a judgment declaring that the value of damages negligently inflicted by Laurie Gregor on N.M., prior to any criminal act, are reasonably valued at an amount in excess of one million dollars (\$1,000,000), and that West Bend Mutual Insurance Company remains liable to

indemnify Laurie Gregor in the amount of the policy limits of one million dollars for this occurrence.

3. With respect to the Counterclaim of the Third Party Plaintiffs, a judgment for the Third Party Plaintiffs against Third Party Defendant West Bend Mutual Insurance Company in the amount of one million dollars (\$1,000,000).

4. An Order for Judgment providing costs, disbursements, and such other relief as the Court deems just.

McELLISTREM, FARGIONE,
LANDY, RORVIG & EKEN, P.A.

Dated: October 4, 2019 By:

M. Fargione

Paul F. McEllistrem, #244521
Robin Sharpe Landy, #184160
Michael Fargione, #28253
7900 International Drive, Suite 700
Minneapolis, MN 55425
(952) 544-5501
pmcellistrem@mcfarg.com
rlandy@mcfarg.com
mfargione@mcfarg.com

ATTORNEYS FOR PLAINTIFF